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## Teaching LLCs Through a Problem-Based Approach

Michelle M. Harner

Robert J. Rhee

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# Teaching LLCs Through a Problem-Based Approach

Michelle M. Harner\*

Robert J. Rhee\*\*

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\* Professor of Law and Director, Business Law Program, University of Maryland Francis King Carey School of Law.

\*\* John H. & Mary Lou Dasburg Professor of Law (designate), University of Florida Levin College of Law; Professor of Law, University of Maryland Francis King Carey School of Law; Professor, Johns Hopkins Carey Business School.

### I. Introduction

Since their first creation by Wyoming in the 1970s, LLCs have become a significant part of the business landscape.<sup>1</sup> Every state has an LLC statute.<sup>2</sup> LLCs are becoming a favored entity for smaller and newer enterprises.<sup>3</sup> As a practical matter, general knowledge of LLCs is important. Many business lawyers will not work in big law firms that traditionally do corporate transactional work involving large public corporations, but all business lawyers, including lawyers at big law firms, will work with LLCs.

Teaching LLCs is challenging for several reasons: a lack of uniformity in the law, an emphasis on private ordering and freedom of contract, and the range of variability in structuring the entity and the constituent relationships.<sup>4</sup> There are two aspects to teaching LLCs: firstly, teaching the default statutory rules and understanding how LLCs are different from other forms of business organizations; secondly, teaching the contracting and transactional aspects, which is a core aspect of practice. The first part lends itself to traditional teaching methods—in other words—reading statutes and appellate cases. The second part is not conducive to this traditional pedagogy. A problem-based approach is needed.

Case studies and case simulations can be used to teach LLCs with an eye toward training business lawyers. These tools can be used in the traditional four-credit Business Associations (BA) course to supplement traditional teaching materials with mini-case studies that accent and apply analysis of primary legal sources. Alternatively, case studies and case simulations can be

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1. See Daniel S. Kleinberger, *Two Decades of "Alternative Entities": From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 451 (2009) (discussing Wyoming's "revolution" of creating LLCs).

2. See Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 886 (2010) ("Today, every state has an LLC statute . . .").

3. See, e.g., Daniel S. Goldberg, *Choice of Entity for Venture Capital Start-Up: The Myth of Incorporation*, 55 TAX LAW. 923, 924 (2002) (arguing that LLCs are a better choice for venture capital startups than corporations).

4. See *infra* note 24 and accompanying text (providing examples of LLC statutes and their explicit endorsement of "freedom of contract").

the centerpiece of a specialized course on LLCs. We discuss both approaches.

## *II. Challenges of Teaching LLCs*

Although LLCs are important business entities and will probably become more important with the passage of time, teaching the subject has three significant challenges.

### *A. Curricular Structure*

In many law schools, BA is a four-credit course that seeks to cover agency, partnership, and corporations, including, perhaps, a little bit of securities regulation with respect to insider trading. Many law school casebooks are written to accommodate this course structure. The time and coverage constraints are significant. Covering the subject of LLCs broadly cannot be done through the typical four-credit BA course while also maintaining traditional coverage of agency, partnership, and corporations. The obvious problem is a lack of credit time if the other subjects in BA are kept. Agency and partnership, not to mention federal statutes affecting corporate governance, should not be given short shrift on account of LLCs. Agency and partnership are, firstly, important, and secondly, practically prerequisites to studying LLCs because the latter are hybrid entities.

Given a four-credit BA course as the standard course in many law schools, LLCs can be studied in two different approaches. The first option is to introduce them selectively in the course of teaching noncorporate business entities in the four-credit BA course. The consideration here is that if many students take only BA as their sole course on business entities, introducing LLCs is better than not teaching the subject at all. We say “selectively” because four credits is simply not enough time to cover LLCs systematically. One thought is that if a student has a good understanding of partnership and corporations, then understanding LLCs in the future will be fairly easy.

The second option is to study LLCs in a separate course. The consideration here is that LLCs are sufficiently important that they deserve systematic treatment. The course can be a two-

credit specialized course with BA as the prerequisite, or it can be a three-credit package of agency, partnership, and LLCs taken before a three-credit course on corporations.

Each option has pros and cons, and we do not recommend one over the other. The choice of curricular structure is unique to the situation of each institution. Factors such as the school's required curriculum, credit allocation of courses, and faculty capacity make a one-size-fit-all recommendation difficult. Regardless of how LLCs are taught, we believe that there should be a curricular space given to teaching transactional aspects of LLCs through appropriate problem-solving-focused pedagogies, and here we endorse the use of case studies and simulations.

### *B. Lack of Uniformity in Law*

Another challenge in teaching LLCs is the lack of uniformity in the laws of LLCs compared to the laws of partnerships or corporations. The Revised Uniform Partnership Act (RUPA) has achieved significant uniformity in partnership laws. For corporations, Delaware law is somewhat of a quasi-national corporation law, and the Model Business Corporation Act (MBCA) has been influential with many states. If a traditional BA course focuses on RUPA, Delaware General Corporation Law (DGCL), and MBCA corporation laws, then, as a general introduction to partnerships and corporations, the syllabus would suffice.

For LLCs there is not a similar gravitational pull. The uniform statutes have not had the same degree of penetration and influence as RUPA. For one thing, LLCs are not as old as partnerships, and there has not been a consensus developed over many decades on what the laws should be. Outside of the minority of states that have adopted one of the two uniform statutes, there are significant state-by-state differences. On the one end are states like Minnesota and North Dakota, which have highly detailed mandatory provisions akin to corporation statutes, and on the other end are states like Alaska whose statute is fairly sparse. The laws of commercially large states, like New York and California, differ from each other as well. The

evolution of LLC laws is continuing. This makes teaching the substantive default rules difficult.

There are several approaches to address this problem. A course could focus on the specific state law in which the law school resides on the premise that many students will practice in the state, or it could focus on the uniform laws and the laws of prominent states like Delaware. Perhaps in a happy coincidence, the law school's state will have adopted one of the uniform laws. In any event, the study of a whole statute requires a curriculum in which two credits are devoted to the subject.<sup>5</sup> Another approach is the typical casebook method, focusing on different treatments by different states and statutes on important issues such as agency, fiduciary duty, veil piercing, and derivative suits. No particular statute is reviewed comprehensively, but various issues are highlighted with different approaches found in state law.

Each approach has pros and cons. If one were to focus on studying just the *analysis* of default legal rules, the casebook method would be the best because it would provide a more comprehensive coverage of major issues and differences among jurisdictions. After such study, reading and analyzing a particular state statute should be an easy transition. On the other hand, if one were to focus on teaching *transactions* involving LLCs, working with a whole statute, whether it be a state or uniform statutes, would be best.

### C. *Emphasis on Private Ordering and Freedom of Contract*

A large part of working with LLCs is a specialized practice in contract drafting. Compared to corporation laws, LLC laws generally have far fewer mandatory provisions.<sup>6</sup> Large sections of

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5. One can also see the possibility of a one-credit module course. Such courses have benefits: they are geared toward teaching a specialized area; there is minimal credit requirement; and they can fit flexibly in the curriculum.

6. See Victor Peterson & Alison N. Zirn, *Corporate Directors, LLCs and Liability*, 12-6 BUS. L. TODAY 57 (2003) ("State LLC statutes contain relatively few mandatory provisions and instead largely supply default rules, which govern only in the absence of express contractual terms. This gives contracting parties wide discretion in drafting operating agreements to structure LLCs as they wish.").

the LLC statutes are default provisions that can be contractually altered.<sup>7</sup> Unlike the corporate charter, the certificate of formation has less operative significance. Instead, the operating agreement—the key governing document for LLCs—can easily contract around most of the default rules contained in the statute.<sup>8</sup>

Accordingly, the study of LLC law should involve learning the transactional aspect of structuring a business entity given a set of business considerations and constituents in a legal regime that provides the greatest degree of private ordering as business entities go. Learning the default rules is the first and easy part of studying LLCs (the assumption here is that by 2L or 3L, most students have learned the skill of reading cases and statutes and there are only marginal gains in this area).<sup>9</sup> After having a general framework for how statutes work, students should learn the skill of transactional application, which is how an LLC works with the amalgamation of default and contract provisions.

### *III. Pedagogical Benefits of the Case Study Method*

Lawyers need to understand how theory and doctrine work together in practice to solve, or at least mitigate, clients' problems. The traditional law school pedagogy of analyzing legal principles through appellate cases and using the Socratic method hones certain skills that assist lawyers in the profession.<sup>10</sup> It is

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7. *Id.*; see also *infra* note 24 and accompanying text (providing examples of LLC statutes and their explicit endorsement of “freedom of contract”).

8. See Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1636–38 (2004) (quoting the Delaware Chancery Court as stating “[o]nce members exercise their contractual freedom in their limited liability company agreement, they can be virtually certain that the agreement will be enforced in accordance with its terms. . . . LLC members’ rights begin with and typically end with the Operating Agreement” (internal citations omitted)).

9. See DEREK BOK, *HIGHER EDUCATION IN AMERICA* 275–77 (2013) (discussing the traditional legal education and how it is poor preparation for practicing law).

10. See WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 51–54 (2007) (commenting that law schools reliance on the case-dialogue method produces a highly analytical but amoral way of thinking);

not, however, complete or sufficient to prepare lawyers fully for practice in today's increasingly complex, global, and ever-changing legal environment. Lawyers also need to develop strong problem-solving skills to create and implement innovative legal solutions grounded in foundational legal principles.<sup>11</sup>

Consider the client who asks her lawyer for advice concerning the appropriate legal entity for her new business venture. A lawyer with a strong foundation in entity law principles can articulate beautifully the attributes of each entity form, including the policies supporting limited liability and its limitations such as veil piercing,<sup>12</sup> the "freedom of contract" principle underlying unincorporated hybrid entities,<sup>13</sup> and the increased standardization and regulatory oversight of the incorporated entity.<sup>14</sup> That lawyer may not, however, possess the

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see also David T. ButleRitchie, *Situating "Thinking Like A Lawyer" Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 37 (2003) (commenting on the strengths of the case study method for first-year law students).

11. See Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 313, 330 (2011) (discussing critiques regarding legal education's perceived disconnect from the needs of the legal market and later discussing an experiment exposing lack of creativity from law students); see also Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 425 (2007) (citing surveys regarding the most important legal skills, with respondents regarding the "ability to diagnose and plan solutions for legal problems" highly).

12. See, e.g., Schnelling v. Crawford (*In re James River Coal Co.*), 360 B.R. 139, 173 (Bankr. E.D. Va. 2007) (discussing plaintiffs' burden to show elements sufficient to pierce the corporate veil in order to impose liability against a controlling shareholder); Frederic J. Bendremer, *Delaware LLCs and Veil Piercing: Limited Liability Has its Limitations*, 10 FORDHAM J. CORP. & FIN. L. 385, 385 (2005) (discussing veil piercing in the LLC context); Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 640 (2005) (discussing veil piercing in the corporate parent-subsiidiary context).

13. See Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 787-89 (2010) (noting that freedom of contract has the upside of strategic planning possibilities but also presents potential for abuse); Kleinberger, *supra* note 1, at 460-71 (criticizing in part the breadth of the freedom of contract in LLCs, particularly in reference to fiduciary duties); Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 222 (2009) (discussing the Delaware LLC's allowance for "ultimate contractual customization among its owners and management").

14. See Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 133-34, 133 n.5 (1999) (commenting on convergence and lack of convergence of global corporate



ability to translate those principles into tangible legal advice based on the particulars of the client's business concept and objectives. She also may not have the capacity to tailor and draft documents that serve her client's interests. As discussed below, this deficiency is especially troubling from the business law perspective as clients are increasingly using entity forms that live or die according to the operating or partnership agreement drafted by the lawyer.<sup>15</sup>

Consequently, lawyers need both sets of skills: both substantive knowledge of theory and doctrine on the one hand, and practical problem-solving skills on the other, are necessary components to an integrated whole.<sup>16</sup> The challenge then is to find ways to complement existing pedagogy with opportunities for students to develop and practice problem-solving skills. The legal academy is slowly progressing in this respect, offering more clinical and experiential learning opportunities for law students.<sup>17</sup> Several commentators also have made great strides in

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governance practices); Jens C. Dammann, *Indeterminacy in Corporate Law: A Theoretical and Comparative Analysis*, 49 STAN. J. INT'L L. 54, 99 (2013) (discussing the "convergence debate in corporate law"); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 334–37 (2001) (discussing institutional characteristics of corporate governance); Henry Hansmann, *How Close Is the End of History?*, 31 J. CORP. L. 745, 748 (2006) (noting that the standardization of global corporate law occurred more quickly than many predicted).

15. See, e.g., *Ross v. Nelson*, 861 N.Y.S.2d 670, 671 (N.Y. App. Div. 2008) (providing one example how a drafting mistake may have unintended consequences); Paul M. Altman & Srinivas M. Raju, *Recent Case Law Developments Relating to Delaware's Alternative Entities*, 6 DEL. L. REV. 201, 203, 205, 208, 209 (2003) (citing several Delaware cases in which the drafting of partnership and operating agreements was deficient).

16. See Kris Franklin, *Theory Saved My Life*, 8 N.Y. CITY L. REV. 599, 599–601 (2005) (discussing the false dichotomy between theory and practice); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 125–26 (1994) (arguing that learning to think like a lawyer requires the acquisition of cognitive skills—theory—and practical skills).

17. See, e.g., Patrick G. Lee, *Law Schools Get Practical*, WALL ST. J. (Jul. 11, 2011), <http://online.wsj.com/news/articles/SB10001424052702304793504576434074172649718> (last visited Jan. 29, 2014) (discussing how some law schools are moving towards teaching more practical skills) (on file with the Washington and Lee Law Review); *NALP Report on Value of Law School Experiential Programs*, PSJD BLOG (Apr. 20, 2011, 4:05 PM), <http://blog.psjd.org/2011/04/20/nalp-report-on-value-of-law-school-experiential-programs/> (last visited Jan. 29, 2014) (noting experiential learning opportunities are growing in popularity among law students) (on file with the Washington and Lee Law

forcing the legal academy to think critically about our traditional norms and considering different ways to prepare law students for the profession.<sup>18</sup>

In this Article, we focus on teaching the transactional application of the law of LLCs. The pedagogy required to teach transactional skills and knowledge requires more than the traditional focus of studying appellate cases from casebooks designed with the traditional classroom experience in mind. An effective way to teach the transactional and business aspects of LLCs is through the business school case method as the primary method of pedagogy, which is the use of case studies and simulations in teaching LLCs.

What are case studies and simulations? We venture to guess that many law professors are unfamiliar with case studies and case simulations. Aside from clinics, the dominant pedagogy in law school is the Langdellian method of studying primary legal

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Review); Debra Cassens Weiss, *Law School Grapples with Student Surplus After Switch to 3L Practical Skills Training*, A.B.A. J. (Jan. 31, 2013), [http://www.abajournal.com/news/article/law\\_school\\_grapples\\_with\\_student\\_surplus\\_after\\_switch\\_to\\_3l\\_practical\\_skill/](http://www.abajournal.com/news/article/law_school_grapples_with_student_surplus_after_switch_to_3l_practical_skill/) (last visited Jan. 29, 2014) (discussing Washington and Lee University School of Law's 3L program and the high enrollment numbers for Class of 2015) (on file with the Washington and Lee Law Review); see also Karen Sloan, *ABA May Ditch Law School Student-to-Faculty Ratio Rule*, NAT'L L.J. (Jul. 16, 2013) (discussing how the ABA Committee reviewing accreditation standards voted to require law students to complete at least six credit hours of experiential learning coursework) (on file with the Washington and Lee Law Review).

18. See Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 319–20 (1997) (discussing how traditional law school pedagogy is often not responsive to different students' learning processes); Richard K. Neumann, Jr., *Donald Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 422 (2000) (arguing that legal educators should challenge and test their assumptions); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992) (providing an early argument for more skills-based training); see also Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1, 2 (2011) (outlining the "ways in which law school and law practice can be brought closer together"); ButleRitchie, *supra* note 10, at 31 (discussing the traditional notion of teaching law students to "think like a lawyer"); Eric A. DeGross, *Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles*, 36 S. ILL. U. L.J. 251, 251–54 (2012) (discussing the differences between learning styles of Generations X and Y and how legal teaching can be adapted); Rhee, *supra* note 11, at 339–40 (discussing the disconnect between legal education and the legal market).

sources, and traditional course materials such as casebooks and statutory supplements serve this need.<sup>19</sup> Case studies and case simulations are fact-intensive problems or descriptions of actions or circumstances in which the analysis or solution has not already been advanced in the form of a legal or judicial opinion.<sup>20</sup> A case study is a compilation of facts, documents, and data from an actual case.<sup>21</sup> In the context of a business transaction, a variant of the case study is deal deconstruction, which scrutinizes the set of final deal documents and outcomes and conducts a post-mortem on business transactions by analyzing the parties' choices memorialized in the agreement against the legal and financial alternatives. A case simulation is similar to the case study in pedagogical function, except that it is a fictional problem created to develop highly specific problems and skills in mind.

Case studies and case simulations differ from the law school case method, based on the study of primary legal sources—principally judicial opinions and statutes—in two ways. Appellate opinions provide a sterilized set of facts (“sterilized” for relevance and procedural posture). The rich set of circumstances giving rise to a complex litigation or transaction is missing after a lower trial proceeding is filtered through the relevance inquiry and the appellate standard of review. Also, a judicial opinion is a legal analysis conducted by a legal expert—the judge—and the law student’s task is to decipher the rule and thereafter analyze it critically.

Case studies and case simulations provide the rich milieu of facts, data, documents, and circumstances, and require students to apply the law to a complex set of facts without the benefit of a prior analysis, which is really the essence of problem-solving. Through these methods, students learn how to analyze business problems and legal issues, and then how to form judgments and to make decisions.

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19. See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1973–75 (2012) (“The most well-known and enduring innovation Langdell introduced was the instruction of students in legal doctrine through the study of written opinions in decided judicial cases—the case method.”).

20. *Infra* notes 22–23 and accompanying text.

21. *Infra* notes 22–23 and accompanying text.

Case studies and case simulations are standard fare in business school pedagogy.<sup>22</sup> These methods are not geared toward deciphering the legal rules or critically analyzing them. There are mostly a recitation of facts and data, and often the problem or issue is not even explicitly stated. Business school professors write case studies on actual situations or transactions. They place the students in the position of the manager or executive, and the teaching method asks students to identify the problem, propose a solution from many potential options, and defend the decision based on facts and data. In any problem, in business or in law, a set of facts constitutes the context and the specific nature of the problem.

Professor Todd Rakoff and Dean Martha Minow aptly describe the business school case as follows:

The archetypical “case” at a business school consists of much more information, and a much more open-ended situation, than the appellate cases used in law schools. They are taught by teachers asking different questions, often in classes as large as law school classes. A careful study by a Harvard Business School professor comparing the methods used in several of Harvard’s professional schools found that alternative “case methods” do indeed develop different skills. Business school students, for example, generate alternative solutions and choose among them more ably than the typical law student; medical school students more successfully learn to identify what they do not know and how to find it out.<sup>23</sup>

For law students, case studies present contextualization. Problems are presented and analyzed from an *ex ante* framework; students are expected to look forward toward an answer. This develops problem-solving skills and requires students to exercise judgment, not just judgment about the formulation of the exact rule of law as required in the drafting of legal briefs and memoranda, but judgment on decisionmaking, the provision of legal advice, and drafting documents. For the latter, much more is needed than the law professor’s hypothetical spinoff from the facts of an appellate opinion, the typical conversation that starts

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22. See Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603–04 (2007) (describing the case method of business school pedagogy).

23. *Id.*

with the professor's query "what if . . . ?" These hypothetical spinoffs develop critical thinking skills in the analysis of the rule of law, but they do not create or recreate the context of complex problems. Case studies and case simulations sensitize students to the uncertainty that pervades the real world, and students learn that business problems require decisions at the end of the day and not just intellectualized analysis untested by the challenges of an actual or simulated problem.

The business school case method should be used to teach LLCs for two reasons. First, the law of LLCs depends heavily on private ordering, and thus teaching LLCs should involve the importance of contracting within default and mandatory rules of the statute. Second, the key benefit of teaching LLCs through the business school case method is *contextualization* for young and inexperienced students. The suggestion that students need better contextualization is a broader comment on legal curricula, but it has special relevance in the area of business associations and business problems more generally. What do case studies contextualize?

First, case studies help students understand entity and forum choice in company formation, as well as in business advising. A case simulation can present a rich set of facts concerning the start of a business enterprise. The facts will put the students in an advisory role. The adviser must understand the business proposition and fit the business and desired governance objectives with the appropriate entity choice. The lawyer will further conduct an analysis of the best jurisdiction for formation.

Second, case studies aid students in understanding contracting problems. The next case simulation or case study can concern the problem of drafting the operating agreement. Many statutes state as a preferred policy the parties' freedom of contract.<sup>24</sup> A case study presents real opportunities for students

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24. See, e.g., DEL. CODE ANN. tit. 6, § 18-1101(b) (2013) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract . . ."); MD. CODE ANN. CORPS. & ASS'NS § 4A-102(A) (2012) ("[T]he policy of this title is to give the maximum effect to the principles of freedom of contract . . ."); see also 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES 524-25 (2d ed. 2011) (listing eighteen states as permitting full power to waive fiduciary duty).

either to review an operating agreement in whole or substantial part, or to draft it. Allowing students to actually work with operating agreements provides essential contextualization of what transactional lawyers do.

Third, case studies highlight the complex interactions of statutes and operating agreements. An important benefit of working on contracting problems is that students will see the interaction of mandatory and default statutory provisions and the freedom to contract in the operating agreement. This is an essential lesson in the field of LLCs, and it is currently taught in the traditional classroom. But like the rules of civil procedure, the lesson is hard to internalize for students until they are actually working to solve business problems through the process of contracting in the context of statutory mandatory and default terms.

Fourth, case studies present students with negotiation opportunities. The formation and governance of LLCs always present negotiation problems: for example, the contribution of nonmonetary assets and the valuation assigned to it. Case simulations in particular may provide rich opportunities for students to deal with these business problems set in a negotiation context.

#### *IV. Integrating Case Studies in a Traditional Podium Class*

##### *A. The Value of the Mini-Case Study Approach*

We believe that greater integration of theory and practice can be achieved in the traditional podium course, Business Associations. A primary benefit to integration of more practice-oriented exercises in traditional podium classes is that the structure models the hybrid analysis required of practicing lawyers.<sup>25</sup> In one class session, students are analyzing a court's

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25. See Peter S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 436–37, 461 (2002) (arguing for a combination of teaching doctrinal law “as applied science” and also on the practicing lawyer’s “artistry of reflection in action” and describing how practical experiences help students develop the ability to learn from the experience); Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L.

treatment of a derivative complaint asserting breach of duty claims and waste against a board of directors; in the next class, they are asked to utilize those legal principles to solve a hypothetical client's transactional needs, such as how to counsel a board of directors considering a merger proposal or an executive's compensation package. A primary disadvantage to this approach is time, both in terms of the time it takes to prepare meaningful case studies for students to use in that second class session and the time it takes away from covering the numerous substantive legal doctrines included in the traditional Business Associations course.<sup>26</sup>

One potential way to mitigate the time issue is to use a mini-case study to cover materials already listed on the Business Associations syllabus.<sup>27</sup> By having students work through the legal issues *ex ante* on behalf of hypothetical clients, a professor can teach the same legal principles articulated in the applicable court decision while allowing students to grapple with the client counseling, drafting, and other practical components of the relevant legal issues. Moreover, by basing the case study on a litigated case, the professor often will have a wealth of resources

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SCH. L. REV. 517, 524–25 (2011) (describing how students become more practice ready through courses that provide real world context).

26. See Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175, 184 (2013) (describing BA as an “impossibly broad course,” which entails many different topics—all in a four-credit-hour course). For example Ms. Heminway describes teaching “partnerships, limited partnerships, basic agency, simple accounting concepts, corporate structure, special problems of close corporations, the regulation of corporate management, a touch of securities law, . . . a dash of corporate financing, [and] federal regulation of insider trading, tender offers, and freezeouts.” *Id.*; see also Robert C. Clark, *Bases and Prospects for Internationalization of Legal Education in the United States*, 18 DICK. J. INT'L L. 429, 438 (2000) (noting that most professors that teach serious substantive courses, like corporations, feel they have too much to do).

27. See Celeste M. Hammond, *Borrowing From the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 30–33 (2009) (providing examples in which the business school case method has been successful in law school courses); Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787, 797–98 (2000) (discussing the use of stories and case studies in legal education, and arguing that such realistic stories give students a window into the multiple layers of analysis they will likely confront in practice).

in the docket and media coverage from which to build the case study.<sup>28</sup>

A professor can use mini-case studies in a variety of ways, no one necessarily better than the others. For example, as illustrated below with the case of *McConnell v. Hunt Sports Enterprises*,<sup>29</sup> a professor can develop a case file for a decision included in her Business Associations casebook and use the case file in lieu of covering the court's decision in detail during class. Students will have guidance from the court's decision and, by tackling the client's legal issues armed with this knowledge, will also experience firsthand the importance of case law to the work of transactional lawyers. Alternatively, a professor could select a court decision not included in the casebook and then provide the decision to the students after the exercise as a metric for students to assess their own work. Similarly, a professor could use a sequel approach, developing a case file that introduces a twist to the fact pattern for students to consider in response to the court's decision in the casebook.

Regardless of the approach used, one important factor is selecting a case with interesting and colorful facts. Students are more likely to invest time in the exercise and engage in classroom discussion if the facts are intriguing and familiar to them. Colorful characters also allow a professor to introduce client counseling challenges, including common ethical dilemmas often encountered by business lawyers. Again, given the high profile and strong personalities involved in the *McConnell* case, it provides a solid foundation for an interesting mini-case study.

### B. The McConnell Mini-Case Study

*McConnell v. Hunt Sports Enterprises* often is presented in the classroom as a clash of titans in a classic joint venture scenario among sophisticated business people.<sup>30</sup> The joint venturers used an LLC to organize and govern their business

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28. See *infra* note 35 and accompanying text (demonstrating the use of trial documents to facilitate a case study teaching method).

29. 725 N.E.2d 1193 (Ohio Ct. App. 1999).

30. See *id.* at 1200 (involving business leaders in Ohio working to obtain an NHL franchise in Columbus, Ohio).



venture.<sup>31</sup> Under cases like *Meinhard v. Salmon*,<sup>32</sup> students know that joint venturers, like partners, owe the venture, and each other, fiduciary duties.<sup>33</sup> The *McConnell* case illustrates how joint venturers can use the LLC form to alter fiduciary duties and whether courts will enforce the terms of those contractual agreements.<sup>34</sup>

This approach to *McConnell* is useful and underscores the flexibility and contractual nature of LLCs. The case can, however, be used for additional teaching objectives. It provides an opportunity to explore voting rights and the role of a managing member.<sup>35</sup> It allows students to review and refine allegedly ambiguous contractual language.<sup>36</sup> It highlights the tension that arises with managing members who might encounter competing opportunities or hold interests in other ventures that might conflict with the interests of the LLC.<sup>37</sup> It also has a really

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31. See *id.* (noting that the joint venturers formed an LLC “to invest in and operate a franchise in the NHL”).

32. 164 N.E. 545 (N.Y. 1928).

33. *Id.* at 546 (“Joint adventurers . . . owe to one another . . . the duty of the finest loyalty. . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”).

34. See *McConnell*, 725 N.E.2d at 1205–06 (discussing the application of contract interpretation principles to LLC Operating Agreements to determine whether an agreement allows members to compete with the company).

35. See Affidavit of John S. Christie at 4–6, *McConnell v. Hunt Sports Enters.*, (Ohio Ct. Com. Pl. 1997) (No. 97 CV 006213) [hereinafter *Christie Affidavit*] (outlining the structure of the CHL LLC and the interactions by and between its members); Columbus Hockey Limited Operating Agreement art. III, *McConnell v. Hunt Sports Enters.*, (1997) (No. 97 CV 006213) [hereinafter *CHL Operating Agreement*] (Members; Rights of and Limitations on Members); *id.* art. IV (Rights, Powers and Duties of Members; Voting).

36. See *McConnell v. Hunt Sports Enters.*, 725 N.E.2d 1193, 1206 (Ohio Ct. App. 1999) (“The test for determining whether a term is ambiguous is that common words in a written contract will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clearly evidenced from the face or overall content of the contract.”).

37. Not only does the case present the conflict between two ventures vying for the same franchise, but it also highlights the issues arising when a member has a portfolio company that might benefit if the LLC pursues one transaction over other alternatives. See *infra* note 40–42 and accompanying text (discussing Lamar Hunt’s interest in a professional soccer team that was trying to finance a new stadium at the same time the CHL venture was trying to finance a new indoor arena).

interesting and colorful backstory that helps bring the characters and conflicts to life, even in a simulation setting.

### C. *Setting the Stage*

When people think of major sports teams in Columbus, Ohio, they frequently think of The Ohio State University, college football, and the Horseshoe stadium where the Ohio State Buckeyes play football on Saturdays in the fall.<sup>38</sup> For many years, Buckeye football, basketball, soccer, baseball, softball, etc. were the Columbus equivalent of the professional sports teams found in other major U.S. cities.<sup>39</sup> Nevertheless, key civic leaders in Columbus were determined to change this and bring major league sports back to Columbus.<sup>40</sup>

Although not a native of Columbus, Lamar Hunt was drawn into these efforts because of his interest in major league soccer and bringing an MLS soccer team to Columbus.<sup>41</sup> In 1994, Hunt purchased a majority stake in the Columbus soccer team, the Columbus Crew, which was one of the ten inaugural teams of the MLS.<sup>42</sup> A major drawback for Hunt and the team was the lack of

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38. See, e.g., Micheline Maynard, *Columbus, Ohio: Don't You Dare Call Us a College Town*, FORBES (Aug. 2, 2013) <http://www.forbes.com/sites/michelinemaynard/2013/08/02/columbus-ohio-dont-you-dare-call-us-a-college-town/> (last visited Jan. 16, 2014) (discussing Columbus and Ohio State in the context of civic identity and stating, “to be honest, I’m betting if you say ‘Columbus’ to people outside your 221.1 square mile area, they’re going to respond in one of two ways: Ohio State, and the Ohio state capitol”) (on file with the Washington and Lee Law Review).

39. Cf. COLLEGE FOOTBALL POLL, OHIO STATE BOWL RESULTS, [http://www.collegefootballpoll.com/bowl\\_history\\_ohio\\_state.html](http://www.collegefootballpoll.com/bowl_history_ohio_state.html) (last visited Jan. 29, 2014) (recording Ohio State’s 1998 Sugar Bowl win, 1996 Rose Bowl win, and long record of major bowl participation) (on file with the Washington and Lee Law Review).

40. See generally TIMOTHY JON CURRY ET AL., HIGH STAKES: BIG TIME SPORTS AND DOWNTOWN REDEVELOPMENT 53–100 (2004) (providing an in-depth accounting of the history to the Columbus Blue Jackets and the dispute between John McConnell and Lamar Hunt underlying the *McConnell* case).

41. See *id.* at 68 (discussing Hunt’s efforts to bring an MLS team to Columbus).

42. See *id.* (“In 1994, when a major, professional soccer league was becoming a reality . . . [Lamar] Hunt . . . bought sixty-three percent of the franchise and became the majority operating partner. The Columbus team was named the Crew.”).

a dedicated soccer stadium in Columbus.<sup>43</sup> Hunt almost immediately began exploring ways to have the city or another financing source build a stadium for the Crew,<sup>44</sup> and he made it clear that such a facility was necessary if the Crew was going to remain in Columbus for the longer term.<sup>45</sup>

Hunt was an attractive ally for civic leaders hoping to expand Columbus's sports franchises given his investment in the Crew and his experiences with other professional sports teams, including the Kansas City Chiefs and the Chicago Bulls.<sup>46</sup> Accordingly, in 1996, civic leaders asked Hunt to join several investors who were trying to bring a professional hockey team to Columbus.<sup>47</sup> The other members of this investor group all had strong ties to Columbus and included John McConnell of Worthington Industries and John Wolfe of the Dispatch Printing Company.<sup>48</sup> Both Worthington Industries and the Columbus Dispatch (the local newspaper) were bedrock corporate citizens in the community.<sup>49</sup>

The investor group organized itself as the Columbus Hockey Limited (CHL), an LLC formed under Ohio law.<sup>50</sup> The LLC had five signatory members: Pizzuti Sports Limited, John McConnell, Hunt Sports Enterprises, Buckeye Hockey LLC, and Wolfe Enterprises.<sup>51</sup> Each member contributed \$25,000 for 25

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43. See *id.* (discussing how the Crew used the Ohio State football stadium).

44. See *id.* at 68–69 (“Hunt did much more than contribute to the ‘process’ [of finding a stadium].”).

45. See, e.g., MICHAEL MACCAMBRIDGE, LAMAR HUNT: A LIFE IN SPORTS 305–07 (2012) (describing Lamar Hunt’s campaign for a stadium); CURRY ET AL., *supra* note 40, at 56, 64 (explaining Hunt’s desire to build stadium for the Crew and the city’s efforts to secure public funding to “ensure that Lamar Hunt’s professional team, the Crew, would remain in Columbus”).

46. See CURRY ET AL., *supra* note 40, at 69 (“Hunt had connections, a good reputation, and experience with the old American Football League (AFL), the Kansas City Chiefs of the current National Football League (NFL), and the Chicago Bulls of the National Basketball Association (NBA).”).

47. *Id.*

48. *Id.* at 69–70.

49. *Id.*

50. See *McConnell v. Hunt Sports Enters.*, 725 N.E.2d 1193, 1200 (Ohio Ct. App. 1999); see also CHL Operating Agreement, *supra* note 35 (describing the CHL’s organization and structure).

51. CHL Operating Agreement, *supra* note 35.

membership units.<sup>52</sup> In 1997, CHL submitted its franchise application to the NHL and began exploring funding for an arena, which was a prerequisite to securing the franchise in Columbus.<sup>53</sup>

At the outset, Hunt's interests in the Crew and CHL did not appear to conflict. The two teams played different sports during different seasons; both teams needed new facilities; and Columbus was hoping to use both teams to help reinvigorate its downtown.<sup>54</sup> Accordingly, Hunt and CHL worked with civic leaders to develop a plan that expanded the Columbus convention center and built both an indoor arena (for the hockey team) and an outdoor stadium (for the soccer team) in close proximity to the convention center.<sup>55</sup> The funding for the development proposal would come largely from taxpayers.<sup>56</sup> As such, the issue was placed on the ballot in May 1997.<sup>57</sup> The taxpayers voted it down.<sup>58</sup>

Another Columbus company, Nationwide Insurance, stepped up and offered to build the indoor arena to allow CHL to remain competitive in the race for the NHL franchise.<sup>59</sup> Notably, Nationwide was only considering an indoor arena (and not an outdoor stadium), and Hunt was reportedly slow to respond to Nationwide's lease proposals for the arena.<sup>60</sup> Hunt also apparently did not inform the other CHL members of his conversations with Nationwide.<sup>61</sup> Nationwide ultimately offered the lease to McConnell and the rest is, as they say, history.<sup>62</sup>

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52. *Id.*

53. *See* CURRY ET AL., *supra* note 40, at 63–64 (discussing CHL's efforts to obtain public funding for an arena).

54. *See id.* at 28–42 (discussing the importance of sports enterprises to the urban redevelopment).

55. *See id.* (explaining how Hunt and the "Dream Team" worked to garner public support to pay for these improvements).

56. *Id.*

57. *Id.* at 82.

58. *See id.* at 82–83 ("[T]he pro-development group lost, 56.3 percent to 43.7 percent."); *see also* Christie Affidavit, *supra* note 35, ¶ 8 ("The arena ballot issue was defeated at the May 6, 1997 election.").

59. *See* CURRY ET AL., *supra* note 40, at 85–86 (describing Nationwide's role in building the arena and redeveloping the surrounding area).

60. *See id.* at 89 (describing Hunt's reaction to Nationwide's proposals).

61. *See id.* (outlining the interaction between Hunt and the other CHL members).

62. *Id.*

*D. The Ownership Dispute*

As explained in the *McConnell* case, McConnell reached a deal with Nationwide on the lease for the arena; presented the lease and a new application (separate from CHL) to the NHL for the new franchise; and was awarded the NHL franchise.<sup>63</sup> Hunt immediately responded to the NHL's decision by sending the NHL a letter that demanded "the NHL forbear from processing any competing application by the McConnells . . . unless and until the dispute is resolved."<sup>64</sup> Lawsuits were immediately filed by McConnell and by Hunt to clarify the ownership of title to the franchise.<sup>65</sup> The upshot of the *McConnell* case is that McConnell and his allies were recognized as the rightful owners of the NHL franchise, to the exclusion of Hunt.<sup>66</sup>

McConnell argued that the language of the CHL Operating Agreement allowed him to compete with CHL for the award of the franchise agreement and disproved Hunt's allegations that he was the managing member of CHL.<sup>67</sup> Hunt argued that, as the "operating member," he did not have to inform the other members of CHL of his discussions with Nationwide and had authority to file lawsuits on behalf of CHL.<sup>68</sup> The relevant provisions of the Operating Agreement include:

**3.3 Members May Compete.** Members shall not in any way be prohibited from or restricted in engaging or owning an interest in any other business venture of any nature, including any venture which might be competitive with the business of the Company, and the Company may engage Members or persons

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63. See Christie Affidavit, *supra* note 35, ¶ 11, 21, 24.

64. CURRY ET AL., *supra* note 40, at 89–90 (internal quotes omitted).

65. See *id.* at 89–90 (discussing McConnell's initial suit against Hunt to enjoin Hunt's participation in the new franchise and Hunt's countersuit for the present value of the expected future profits of the franchise).

66. See *McConnell v. Hunt Sports Enters.*, 725 N.E.2d 1193, 1220–23 (Ohio Ct. App 1999) (noting that McConnell's faction did not cause the wrongful dissolution of the LLC that sought the NHL franchise agreement and that McConnell's faction had the right to seek control of the NHL franchise).

67. See Plaintiffs' Summary Judgment Motion on Count I of Plaintiffs' First Amended Complaint and Claims One Through Five of Defendants' Counterclaim at 4–5, *McConnell v. Hunt Sports Enters.*, No. 97CVH-06-6213 (July 3, 1997) [hereinafter Summary Judgment Motion].

68. See *McConnell*, 725 N.E.2d at 1217 (noting that Hunt's group believed it had "full authority to act on CHL's behalf").

or firms associated with them for specific purposes and may otherwise deal with such Members, on terms and for compensation to be agreed upon by any such Member and the Company.

4.1 Approval by Members. Except as provided in subsection (a), no Member shall take any action on behalf of the Company unless such actions are approved by a vote of the specified number of Members:

- (a) [A provision authorizing Pizzuti Sports Limited and John B. McConnell to take certain actions to start the NHL application process, apply for a federal taxpayer identification number, and open bank accounts for the LLC.]
- (b) Unless the approval of a greater number of Members is required by subsection (c), any action (except the action in subsection (a)) requiring the approval of the Members in this Agreement shall require the approval of Members holding a majority of the Units allocated to all Members.
- (c) The following actions require the approval of Members owning all of the Units allocated to the Members:
  - (i) sell, transfer, exchange or otherwise dispose of all or substantially all of the Company's properties;
  - (ii) change the primary character of the business of the company;
  - (iii) assign the property of the Company in trust for creditors or on the assignee's promise to pay the debts of the Company;
  - (iv) dispose of the goodwill of the business of the company;
  - (v) do any other act that would make it impossible to carry on the ordinary business of the Company;
  - (vi) confess a judgment;
  - (vii) submit a claim or liability of the company to arbitration or reference; and
  - (viii) call for additional capital as provided in section 5.2.

4.2 Voting. . . . Members owning a majority of the Units allocated to all Members may call a meeting at any time upon at least 10 but no more than 20 days written notice to all Members. A majority of Members shall constitute a quorum at any such meeting, but any action requiring the approval of a certain number of Members may not be authorized except by the affirmative agreement at such meeting by such number of Members. . . .

4.3 Duties of Members; Not Required to Devote Full Time. The Members shall manage or cause to be managed the affairs of the Company in a prudent and businesslike manner and shall devote such time to the Company affairs as they shall in their discretion exercised in good faith determine is reasonably necessary for the conduct of such affairs; provided, however, that it is expressly understood and agreed that no Member shall be required to devote their entire time or attention to the business of the Company. . . .<sup>69</sup>

The court favored McConnell's interpretation of the Operating Agreement, but only after the filing of three separate lawsuits, extensive briefing and discovery, and the expenditure of the parties' time and money.<sup>70</sup> By analyzing the sophistication (and other attributes) of the parties to the CHL Operating Agreement, their respective motivations, and the language of the agreement itself, students can gain a greater appreciation of counseling clients in business transactions and develop some basic drafting skills.

### *E. Potential Issues for the Mini-Case Study*

Armed with the backstory to the CHL venture, students can engage in various exercises to enhance their understanding of LLCs, entity law, and transactional practice. For example, a professor can ask students to develop a list of the parties' objectives and potential deal issues. Such a list could include:

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69. *Id.*

70. *See McConnell*, 725 N.E.2d at 1226 (affirming the trial court's rulings in favor of the McConnell faction on all counts involving contract interpretation); *CURRY ET AL.*, *supra* note 40, at 90 (noting the various suits "dragged on for two . . . years," had a complicated procedural history involving two states and several appeals, and left Hunt with "nothing . . . except lawyers' fees").

Hunt's potential conflict of interest and how he could try to use CHL to leverage a stadium for the Crew; Hunt's interests in other sports franchises; McConnell's and the other members' interest in securing the hockey franchise for economic development purposes in downtown Columbus; and the funding gap apparent between the members' capital contributions and the cost of running the franchise and building an arena.<sup>71</sup> Students rarely have an opportunity to draft client decision trees or script deal points outside of the clinical setting in law school.<sup>72</sup> This exercise at least introduces the concept to students in the business setting.

A professor then can assign students to represent the various parties or continue to work through the case study as a class. The important themes in this discussion include: identifying the key negotiation points and potential deal breakers, analyzing how those points fare under applicable law, and discussing the appropriate balance in maximizing the clients' interests and not blowing up the deal.<sup>73</sup> Given the limited time in the traditional Business Associations class, a professor can use the Operating Agreement provisions outlined above as the proposed "draft"

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71. See *supra* notes 40–62 and accompanying text (outlining the factual history of the *McConnell* case and illuminating the potential motivations of each actor therein).

72. See, e.g., RONALD M. SHAPIRO, DARE TO PREPARE: HOW TO WIN BEFORE YOU BEGIN 201–21 (2008) (explaining the value of "scripting" important points for client meetings and negotiation sessions); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 906 (2000) (identifying the importance of the lawyer's role in helping clients solve their legal issues through effective negotiation).

73. See, e.g., RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE: HOW TO NEGOTIATE SO EVERYONE WINS—ESPECIALLY YOU! 25, 226–27 (2001) (discussing the importance of understanding negotiation points before beginning a negotiation and offering solutions for how to unlock difficult negotiations); Anthony K. Tjan, *Four Rules for Effective Negotiations*, HBR BLOG NETWORK (July 28, 2009, 8:30 AM), <http://blogs.hbr.org/2009/07/four-rules-for-effective-negot/> (last visited Nov. 11, 2013) (noting the importance of understanding the motivations of the other side; not wavering from an initial bargaining position unless it is possible to make other, unrelated gains; and willingness to "walk away" from a deal) (on file with the Washington and Lee Law Review); Andrew Ward et al., *Acknowledging the Other Side in Negotiation*, 24 NEGOTIATION J. 269, 281–82 (2008) (suggesting that "explicit acknowledgment that one has attempted to accommodate the expressed position and interests of the other side" may be the key to securing a desired outcome in a negotiation).



agreement and extract these concepts by asking students to mark up the draft.

For example, the following might be a proposed markup of Section 3.3:

3.3 Members May Compete. Members shall not in any way be prohibited from or restricted in engaging or owning an interest in any ~~other~~ business venture of any nature, including any venture ~~which~~ that is or might be competitive with the business of the Company. If a Member engages, or owns an interest, in a venture in a professional hockey related business, the Member shall disclose only that he or she is involved in such a venture to the other Members at the beginning of that business relationship and shall have no other obligations or duties to the Company or the other Members as a result of that relationship. ~~and~~ the ~~The~~ Company may engage Members or persons or firms associated with them for specific purposes and may otherwise deal with such Members, on terms and for compensation to be agreed upon by any such Member and the Company.

In analyzing this markup, a professor should first emphasize how difficult it is to second guess contract language because one does not know what language was considered during the negotiations or what bargaining chips were exchanged for the language included in the final contract. With that caveat, a professor can discuss how the markup of Section 3.3 might or might not reflect the intent of the parties. What if the parties never discussed the possibility of one or more of them competing for the NHL franchise? What if the provision was added solely to recognize that the parties were sophisticated business people with multiple business ventures, including ventures in sports related businesses (but not necessarily hockey)? What are the potential negative consequences to including language addressing the specific conflict and LLC opportunity at issue? Do we get to this same result under *Meinhard v. Salmon* without the additional contractual language?<sup>74</sup>

Other aspects of the CHL Operating Agreement and underlying ownership dispute also work well in this type of class discussion (or in a negotiation simulation). For example, a

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74. See *supra* notes 32–33 and accompanying text (mentioning the heightened duty analytical framework outlined in *Meinhard*).

professor can ask students to draft a management provision that might align with Hunt's conduct and assertion that he was leading the negotiations for CHL.<sup>75</sup> In drafting that provision, students also could consider what types of protections McConnell and the other members would want to protect their interests. Is the voting provision sufficient? Would additional reporting and disclosure obligations help mitigate their concerns? Should the Operating Agreement specifically reference Hunt's potentially conflicting interests in the Crew and how he should handle negotiations potentially impacting both franchises?<sup>76</sup>

The point of using a mini-case study is not to cover every issue or answer every question but to encourage students to develop the relevant issues and questions outside of the court's recitation of static facts and decided legal principles. It forces students to think, process, and articulate concepts and legal arguments in the moment, which are critically important skills for a transactional lawyer. It pulls them out from behind their laptops and starts to socialize them to the legal practice. Moreover, in the specific context of Business Associations, a mini-case study can achieve these objectives while enriching students' substantive understanding of LLCs and entity law.

#### V. Case Studies as the Centerpiece Pedagogy

If the study of LLCs is carved out from the traditional four-credit BA class as a devoted standalone class, the business school case method would be a good way to teach the subject. The case method can be both actual case studies and simulations. One can envision a series of case studies and simulations as supplemented by the Langdellian method of reviewing appellate case opinions and statutes through the traditional lecture (classroom) format.<sup>77</sup>

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75. See *supra* note 68 and accompanying text (discussing Hunt's claim that he was the "operating member" of CHL and its implications within the context of the *McConnell* case).

76. See *supra* notes 40–45 and accompanying text (outlining Hunt's ownership interest in the Columbus Crew and laying the foundation for potential conflicts with his participation owning an NHL expansion franchise).

77. See Spencer, *supra* note 19, at 1973–75 (discussing Langdell and "The Case Method").

These case studies and case simulations can be organized around the specific subjects contained in traditional casebooks.

In the past several years, one of this Article's authors—Rhee—has written business school-style case studies and simulations when opportunities presented themselves.<sup>78</sup> In the subject of LLCs, he has written a 263-page self-contained case study (page count including the Maryland LLC statute and the RULLCA), titled *Alex Paulson v. Hopkins Operative & Surgical Care, LLC, et al.: A Business Dispute Arising Out of the*

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78. In addition to the two LLC case studies and the case simulation referenced in this Article, Professor Rhee has written two other case studies dealing with financial transactions. The first case study was written as a part of a law review article. See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice during a National Crisis*, 17 GEO. MASON L. REV. 661, 664–96 (2010) (containing the complete case study). Subsequently, Professor Rhee excised this case study and separately packaged it as a standalone educational product in SSRN and Bepress. See Robert J. Rhee, *Case Study of the Bank of America and Merrill Lynch Merger* (Univ. of Md. Legal Studies Research Paper No. 21, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579397](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579397). The case study focused on the policy and ethical aspects of corporate governance in the context of a public crisis such as the financial crisis of 2007–2009. See *id.* at 1–2 (providing a general overview of the case study and the topics covered therein). As of November 11, 2013, the case study has been downloaded 1,375 times in SSRN and 1,312 times in Bepress. “Paper Statistics,” *Case Study of the Bank of America and Merrill Lynch Merger*, SOC. SCI. RES. NETWORK (Mar. 27, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579397](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579397) (last visited Jan. 30, 2014) (on file with the Washington and Lee Law Review). Professor Rhee believes, based on occasional email exchanges, that some of these downloads were on account of course reading requirements at other schools.

Professor Rhee has also written a thirty-page case study, titled *Warren Buffett's Preferred Stock Investment in Goldman Sachs During the Financial Crisis*. This case study was presented to students in Professor Rhee's course, Corporate Finance, in the fall 2013 semester at the University of Maryland Francis King Carey School of Law and Georgetown University Law Center. This case study used some background materials in the law review article, Robert J. Rhee, *The Decline of Investment Banking: Preliminary Thoughts on the Evolution of the Industry 1996–2008*, 5 J. BUS. & TECH. L. 75 (2010), and then provides the facts, corporate documents (including SEC filings and certificates of incorporation and designations), and financial statements related to the \$5 billion preferred stock and warrants deal between Berkshire Hathaway and Goldman Sachs, as well as the \$10 billion TARP investment by the U.S. Treasury in the midst of the financial crisis of 2008–2009. The preliminary feedback from students has been positive. They appreciated studying the full text of the corporate documents, as well as understanding how preferred stock and warrants were used in the context of an important transaction during an important time period in the financial markets.

*Operations of an LLC*, which is a fictionalized version of an actual case.<sup>79</sup> This case concerns the withdrawal of a member by expulsion and the member's rights under the operating agreement and the state statute. The benefit of this case study is that the essential nature of the dispute was based on an actual case, and thus there is a strong sense of realism. This case study has not been published in any medium, and as yet it has not been tested on students.

Professor Rhee has also written a thirty-seven-page case simulation, titled *Tribeca Real Estate Management LLC: Negotiating Contribution in an LLC*.<sup>80</sup> The Tribeca simulation concerns the negotiation over a contribution to an LLC by a managing member of an interest in another LLC. We discuss this simulation below to convey a sense of the problem and the pedagogical benefit of presenting course materials in this format.

#### A. Summary of the Tribeca Simulation<sup>81</sup>

In this problem, there are two principal LLCs. Zigzag Furniture, LLC (ZZF) is an Illinois chartered limited liability company, with its principal place of business in Memphis, Tennessee. Its main business is the manufacture of custom office furniture fitted from prefabricated parts (a high quality IKEA-type furniture manufacturer for large scale commercial offices). It

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79. Robert J. Rhee, Case Study—Alex Paulson v. Hopkins Operative & Surgical Care, LLC, et al.: A Business Dispute Arising Out of the Operations of an LLC (unpublished manuscript) (on file with author). Fictionalized means that names, testimonies, and documents have been entirely changed, but the essential nature of the dispute and legal issues have been preserved. The opportunity to formally write a case study presented itself because the University of Maryland Francis King Carey School of Law encouraged curricular innovation and incentivized it through the provision of a small grant. Professor Rhee notes that this initiative was encouraged and administered by then Associate Dean and Professor Michelle Harner.

80. Robert J. Rhee, Case Study—Tribeca Real Estate Management LLC: Negotiating Contribution in an LLC (unpublished manuscript) (on file with author). This case simulation was written because the University of Maryland Francis King Carey School of Law and the law firm DLA Piper partnered in a pilot program to provide business training to the law firm's junior associates.

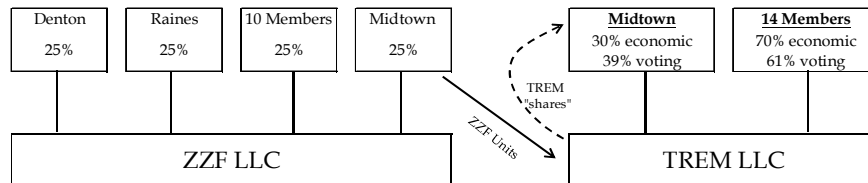
81. The materials detailed in this Part are derived from Robert J. Rhee, Case Study—Tribeca Real Estate Management LLC: Negotiating Contribution in an LLC (unpublished manuscript) (on file with author).

is a member-managed LLC, but in reality, two founders, Denton and Raines, control the firm in ownership and management.

Tribeca Real Estate Management, LLC (TREM) is a Maryland organized limited liability company, and it manages commercial real estate properties. TREM specializes in new office rentals and build-outs of new offices, which requires some general contracting, interior build-out, and furnishing capabilities. It provides full office space solutions to commercial landlords and tenants. It is a manager-managed LLC with Midtown as the designated manager member, and it has fourteen individual members.

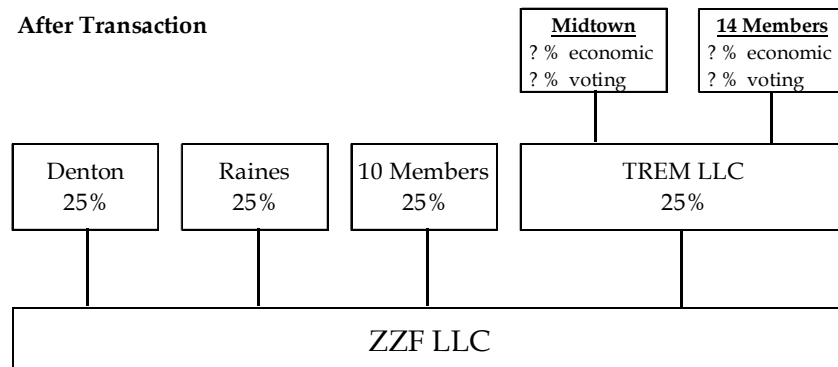
The contemplated transaction is driven by Midtown Inc., the managing member of TREM. It seeks to contribute its 25% minority ownership stake in ZZF to TREM for an additional stake in TREM.

#### Proposed Transaction



After the transaction, the ownership structure of the two companies would look like this.

#### After Transaction



The parties are told that the transaction idea, originating from Midtown, is that the separate businesses of ZZF and TREM

can be combined to yield synergies among the activities of commercial real estate agency, commercial interior design, custom build-out, and custom office furniture manufacturing. The new CEO of Midtown inherited the separate investments in the two companies from her predecessor. She wants to do the contribution transaction because the transaction will make the separate investments in ZZF and TREM more coherent by fitting a broader business strategy and model for Midtown, and because Midtown wants to increase its proportional ownership stake in TREM.

There are five roles in the simulation: (1) Midtown, (2) Midtown's lawyer, (3) TREM's lawyer, (4) representative of fourteen individual members of TREM, and (5) representative of Denton and Raines. All parties get a "Common Packet," which provides the basic information that should be known to all parties involved, including information that one expects to be disclosed through a proposal and due diligence process, *e.g.*, the operating agreements and financials. Each role also gets a unique "Confidential Instructions" packet providing confidential facts and instructions. In addition to other information, the lawyer roles are given statutory provisions applicable to the two LLCs, excerpts of operating agreements, and some edited case opinions.

Midtown is driving this transaction, and a key part of executing its business strategy is to persuade the majority owners of TREM (the fourteen individual members). The problem gives the Midtown role sufficiently detailed information on how the strategy would work. The information given is qualitative and quantitative. Among other things, rudimentary financial data were provided for TREM and ZZF. Below is an example of the level of detail provided in the two sets of financials.

## INCOME STATEMENT (TRIBECA REAL ESTATE MANAGEMENT)

	2010	2011	2012	CAGR
Revenue				
Management fees	2,408,204	2,528,614	2,629,759	4.5%
Contracting and design	1,485,208	1,663,433	1,929,582	14.0%
Total revenue	3,893,412	4,192,047	4,559,341	
Operating expenses	(1,816,059)	(2,044,116)	(2,139,288)	
Operating profit	2,077,353	2,147,931	2,420,053	7.9%
<i>Operating profit margin</i>	53.4%	51.2%	53.1%	
Interest expense	(40,000)	(40,000)	(40,000)	
Pretax profit	2,037,353	2,107,932	2,380,054	8.1%
<i>Pretax margin</i>	52.3%	50.3%	52.2%	
Pretax profit for 14 Members @ 70%	1,426,147	1,475,552	1,666,038	
Pretax profit for Midtown @ 30%	611,206	632,380	714,016	
Pretax profit per unit	20,374	21,079	23,801	

## 2012 BALANCE SHEET (TRIBECA REAL ESTATE MANAGEMENT)

Assets		Liabilities	
Cash	245,849	Account payables	447,881
Receivables	264,852	Note payable	500,000
Building	1,381,250	Capital Contributions	
(accumulated depreciation)	(131,000)	<i>Member Units</i>	
		Midtown (30 units)	300,000
Equipment	441,230	14 Members (70 units)	700,000
(accumulated depreciation)	(54,300)	<i>Managing Member Units</i>	
		Midtown (1 unit)	200,000
Total Assets	2,147,881	Tot. Liab. & Equity	2,147,881

In addition to the negotiation that must occur between Midtown and the 14 members of TREM, there is a further set of considerations between ZZF and Midtown. ZZF has a right of first refusal on any transfer of Midtown's stake. Both ZZF and Midtown want high valuation of the ZZF stake. Midtown's motives are obvious. For ZZF, it considers the contribution transaction as a potential valuation benchmark in an anticipated capital raise in the near future.

Complicating the matter further is a contingent contract and tort liability arising from the emanation of formaldehyde from

ZZF's furniture.<sup>82</sup> The representative of Denton and Raines, having management responsibilities, has the best information on the problem, though as a developing matter the information is not perfect and there is significant uncertainty on the issue. The nature of the problem is set forth in the confidential instructions. Midtown knows of the problem, but has less information and may have a misguided opinion of the scale of the problem based on guesswork. The fourteen individual members of TREM have no information on the contingent liability.

When the five role players meet to resolve the transaction, they must sort out a number of issues and problems, and construct a decision framework:

- *Fourteen individual members:* What are the potential benefits and costs of having TREM taking a stake in ZZF? Do they really want an investment in a furniture manufacturer? What accretion or dilution of earnings will there be? Do they really want Midtown taking a greater economic and voting stakes in TREM? What are the implications of becoming minority owners? How should TREM and ZZF be valued relative to each other?
- *Midtown:* Given that it is committed to doing the transaction as a business model, how does it persuade the rest of the membership in TREM to go along with it? What additional economic and voting stakes can it get for its ZZF contribution? What is the implication of the contingent product liability on the transaction? Can the uncertainty surrounding the liability be dealt with through the contracting process? What information should be communicated to the 14 TREM members?
- *ZZF:* What is the implication of a change in ownership of Midtown's stake? Does it exercise its right of first refusal and buyout the stake? What relative valuation

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82. ZZF's business model and the formaldehyde problem are based on IKEA's business model and an incident involving a similar problem with some of its furniture in the past. See Christopher A. Bartlett, Vincent Dessain & Anders Sjomán, *IKEA's Global Sourcing Challenge: Indian Rugs and Child Labor (A) & (B)*, HARV. BUS. SCH. CASE # 906414-PDF-ENG AND # 906415-PDF-ENG (May 3, 2006).



can be achieved for the purpose of setting a benchmark capital transaction? What should be done about the contingent product liability? What information should be communicated to Midtown?

- *Midtown's lawyer*: How does this transaction create value? What is the lawyer's role in this transaction? What legal advice should be given? What role does the lawyer take in the negotiation? How should the lawyer deal with the ethics of adverse information disclosure or nondisclosure?
- *TREM's lawyer*: What is the lawyer's role in this transaction? Who is the client when the members are on different sides of the bargaining table? What legal advice should be given? What role does the lawyer take in the negotiation? What is the appropriate tone and posture to take when Midtown, as the manager, has hired the lawyer but the engagement requires the representation of the entity?

### *B. What Are the Pedagogical Goals?*

The basic problem in the case simulation is a contribution transaction. However, the application of the law to what appears to be, in concept, a simple transaction is not simple at all. There are many issues and problems in the simulation. Although the size of the business transaction is small, the issues are complex.<sup>83</sup> The business situation is “scalable” to the types of situations in which larger businesses may find themselves. There are a number of pedagogical benefits to engaging students in complex problems requiring active problem-solving as opposed to desktop analysis of discrete legal issues, which is promoted in the traditional case law analysis. The application of the law is more immediate and concrete. In the field of LLCs, this is particularly important because so much of “the law” is based on private ordering of the governance and economic relationships among

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83. Professor Rhee has noted in a training session using this problem that it is not so unusual that smaller deals can be every bit as complicated as larger deals, and sometimes larger deals can be simpler.

parties, and thus understanding the default statutory rules is simply the starting point.<sup>84</sup>

An opportunity to work through an actual LLC problem with greater factual context provides greater benefits than the typical classroom hypothetical. When a complex problem is presented, students are required to assimilate significant amounts of information. In this simulation, the information covers the gamut of business, financial, legal, and negotiation issues. The issues are intertwined and are not so easily segregated, and particularly the legal issues require integration into the business problem.

Students must navigate a multi-party discussion and negotiation, and like all negotiations there are significant information asymmetries to work out. Things that need to be worked out are common and mundane, but are extremely important issues in practice: How should the procedure and manner for discussion take place? What are the professional dynamics of the players? In this problem, there is an overarching negotiation problem: How should the parties frame the discussion in light of so many issues? Should issues be dealt with serially or as a whole or logrolled as a package?

Lastly, and perhaps most importantly, the simulation requires exercise of judgment. Judgment and decisionmaking are important skills to emphasize, and these skills are different from analytical skills of reading primary sources of law. In this simulation, the complex negotiations require instances of good judgment. The problems of the contingent liability and the nature of the information asymmetry present ethical choices among some members. These ethical choices are not divorced from the consideration of good business practices and commonsensical understanding of the human relational aspects of engaging in business.

The authors of this Article presented the *Tribeca* simulation in two different sessions. In the spring of 2013, we presented it to eight junior attorneys at a large national law firm as a part of a training session. The training session was observed by partners at the firms as well. The feedback from the participants was positive. Based on this feedback and the observed level of

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84. See *supra* note 24 and accompanying text (providing examples of LLC statutes and their explicit endorsement of “freedom of contract”).

participation and engagement with the problem, we believe that the problem was sufficiently complex and substantive to meet the training needs of junior attorneys. Based on our collective experience, the discussion seemed realistic and some of the problems and impediments encountered by the participants also seemed realistic.

In the fall of 2013, we presented the problem to a class of about ninety students, mostly 2Ls, during the beginning of the fall semester. Many of these students were just taking BA, and did not have a background in different forms of entities. At first, some of the students felt overwhelmed with the complexity of the problem. This was their first exposure to a significant problem involving a business organization, and the financial data was a source of confusion because many students did not bring any background in accounting or finance. The lack of some basic knowledge required a supplemental email explanation. However, when the students got into the transactional negotiation session (a 2.5 hour class session), we observed that they were very engaged with the problem. The level of discussion among groups was, overall, very good, and we observed students attempting to solve the problem from different angles.<sup>85</sup>

As mentioned above, one of the most important skills developed when case studies and case simulations are used is that students have opportunities to exercise judgment. This point was highlighted when we observed how the parties with knowledge of the contingent liability dealt with the problem. Among most groups, there were active discussions between Midtown, its lawyer, and sometimes ZZP about how to handle to contingent liability with respect to the TREM members. However, in a few groups, the fact was never disclosed. In one situation, Midtown's lawyer was informed of the problem, but the two players decided not to disclose. In another group, Midtown never informed its lawyer of the problem. Of course, the fact of the contingent liability was disclosed during the class debrief session, and it was apparent from the reactions of those who did not know that an implied understanding of trust had been breached. The class discussion then evolved into a broader discussion of

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85. We will soon have formal course evaluations. Upon review, we can share the information learned from them.

fiduciary obligation under the law and operating agreement, ethics and professional responsibilities, and business realities such as the difference between one-shot and repeat transactions, the dynamics of business organizations, and the relationship between business and legal risks.

Thus, in two different settings, the problem seemed to work as designed and the level of learning observed was significant. Business lawyers must have sound analytical skills in understanding the law, but they must also exercise sound judgment in the process of solving business and transactional problems. A case study-based class or course can facilitate the development of multiple skills in the context of learning LLCs.

#### *VI. Conclusion*

We believe that LLCs are important to teach given their rising prominence in the business world. It is a challenge to fit the subject in the curriculum. The subject deserves proper treatment, but we suspect, given the relative paucity of casebooks, that LLCs are not taught as frequently as the subject should be. Moreover, there are challenges in pedagogy. We believe that, given the prominence of default rules and private ordering, LLCs should be taught with the goal of creating business lawyers good at problem-solving. This focus of study can be facilitated through the use of case studies and case simulations. By walking through a few examples of what case studies look like and how they can be used, we hope to demonstrate the merits of using them. We believe that the effort required is worth it when compared to the expected learning outcomes.